BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	A. 14-04-013 (Filed April 11, 2014)

JOINT REPLY OF COMCAST CORPORATION, TIME WARNER CABLE INC., TIME WARNER CABLE INFORMATION SERVICES (CALIFORNIA), LLC, AND BRIGHT HOUSE NETWORKS INFORMATION SERVICES (CALIFORNIA), LLC TO PROTESTS ON THE JOINT APPLICATION

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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application No. 14-04-013 (Filed April 11, 2014)

JOINT REPLY OF COMCAST CORPORATION, TIME WARNER CABLE INC., TIME WARNER CABLE INFORMATION SERVICES (CALIFORNIA), LLC, AND BRIGHT HOUSE NETWORKS INFORMATION SERVICES (CALIFORNIA), LLC TO PROTESTS ON THE JOINT APPLICATION

I. INTRODUCTION

On April 11, 2014, Comcast Corporation, Time Warner Cable Inc. ("Time Warner Cable") on behalf of itself and its wholly-owned subsidiary Time Warner Cable Information Services (California), LLC ("TWCIS (CA)"), and Bright House Networks Information Services (California), LLC ("Bright House California") (collectively, "Joint Applicants") filed an Application to request that the California Public Utilities Commission ("Commission") authorize the transfer of indirect, ultimate control of TWCIS (CA) (U-6874-C) and the pro forma transfer of control of Bright House California (U-6955-C).[1] Pursuant to Rule 2.6(e) of the California

[1] Application No. 14-04-013 (the "Application") at 1.

Public Utilities Commission's Rules of Practice and Procedure ("Rules"), Joint Applicants hereby submit this Response to the Protests to the Application.[2]

The Application seeks very specific—and narrow—relief: Authorization from the Commission under California Public Utilities ("PU") Code section 854(a) for the transfer of control of TWCIS (CA) and pro forma transfer of control of Bright House California, both Competitive Local Exchange Carriers ("CLECs") that hold Commission Certificates of Public Convenience and Necessity ("CPCNs"). Despite the narrow focus of the Application, Respondents' Protests attempt to inject into this proceeding extraneous issues that have nothing to do with the proposed transfers (such as the broadband and cable businesses of *other* entities not before the Commission) and that concern businesses and entities over which this Commission plainly lacks jurisdiction. For the reasons explained below, the Commission should reject Respondents' attempts to enlarge this proceeding beyond the particular issues the agency is called upon to address.

Instead, the requested transfers should be approved under section 854(a)—the only applicable section of the PU Code—because they will enhance consumer welfare and competition and will deliver substantial public interest benefits, including promoting deployment of voice services and enhancing competition in the California voice services marketplace.

II. THIS PROCEEDING SHOULD BE LIMITED TO THE REQUEST SET FORTH IN THE APPLICATION

As clearly specified in the Application, Joint Applicants seek the indirect transfer of control of TWCIS (CA) and the pro forma transfer of control of Bright House California—two CLECs. Joint Applicants do not, and are not legally obligated to, seek Commission approval via

[2] Protests and Responses were filed by DISH Network L.L.C. ("DISH"), the Greenlining Institute ("Greenlining"), the Joint Minority Parties ("JMPs"), the Office of Ratepayer Advocates ("ORA"), and The Utility Reform Network ("TURN") (collectively referred to as the "Respondents").

an application for transfer of control of any other entities affiliated with TWCIS (CA) or Bright House California, such as those uncertificated entities that provide only cable or Internet Protocol-enabled ("IP-enabled") services (including broadband, Internet access and Voice over Internet Protocol or "VoIP" services).[3]

Nevertheless, much of the focus of the Protests is on the alleged impact of the proposed transfers on broadband and cable television services—services not provided by the present Joint Applicants, but instead provided by other non-utility affiliates. For example, Greenlining and the JMPs discuss at length the roles of Time Warner Cable and Comcast Corporation as providers of *cable services*.[4] In a similar vein, ORA ignores the limited purpose of the Application, instead focusing on the alleged broader impact of the national merger on the provision of "high-speed last mile *broadband service*."[5] JMPs also focus on other Comcast Corporation entities' alleged power over video content.[6] Because many of the objections raised in the Protests focus on cable and broadband services not provided by the CLECs at issue here, they should be rejected as irrelevant and outside the scope of this proceeding. These non-CLEC services will be fully considered by the Federal Communications Commission ("FCC"). as part of its evaluation of the larger transaction between Comcast Corporation and Time Warner Cable.

The Respondents not only err in focusing on the wrong services (broadband and cable services), they also focus on the wrong entities. For example, ORA's Protest contains wholly irrelevant—and, in any event, baseless—allegations about an ongoing franchise fee dispute

[3] As explained in the Application, pursuant to PU Code section 5840(m), Joint Applicants will separately notify the Commission of the change in control of the cable franchises held by Time Warner Cable Pacific West LLC and the pro forma transfer of control of the parent of Bright House California, Bright House Networks, LLC ("BHN"). Application at FN 2.

[4] *See* Greenlining Protest at 19 (emphasis added); JMP Protest at 5.

[5] ORA Protest at 2 (emphasis added).

[6] JMP Protest at 5-6

between a municipality and a non-party, cable affiliate of TWCIS (CA).[7] That cable matter has nothing to do with the regulated telephone service at issue here, and it is also completely irrelevant to either of the regulated utilities impacted by the proposed transfers (TWCIS (CA) and Bright House California).

The Commission should recognize that this proceeding is limited to whether the requested transfer of control of TWCIS (CA) and the pro-forma transfer of control of Bright House California should be approved under PU Code section 854 in light of the implications of that transaction for the regulated telecommunications and telephone services offered by those two CLECs. Respondents' other issues stray well beyond the narrow scope of this proceeding, and their attempt to inject those extraneous issues into the proceeding should be rejected.

III. PU CODE SECTION 854(A) PROVIDES THE GOVERNING STANDARD OF REVIEW

The instant transaction is clearly governed by PU Code section 854(a).[8] That provision states that "[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or *control* either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission."[9] ORA,[10] Greenlining,[11] TURN,[12] and JMPs[13] unreasonably urge the Commission to *also* review the Joint Application under PU Code sections 854(b) and (c). However, as explained in the

[7] ORA Protest at 15.

[8] JMPs misunderstand Joint Applicants as contending "that the CPUC has no jurisdiction under section 854(a)." JMP Protest at 3. Joint Applicants contend no such thing; to the contrary, the Application clearly stated that it seeks approval section 854(a). *See* Application at 12.

[9] PU Code section 854(a) (emphasis added).

[10] ORA Protest at 11.

[11] Greenlining Protest at 3-5.

[12] TURN Protest at 7-9.

[13] JMP Protest at 4.

Application, sections 854(b) and (c) do not apply. Furthermore, even if section 854(c) were applicable, the Commission should waive application of that section. Finally, Joint Applicants have shown that the proposed transaction satisfies the section 854(c) criteria even if that provision does apply.[14]

A. PU Code Section 854(b) Does Not Apply

As explained in the Joint Application, "Section 854(b) is triggered only 'where any of the *utilities* that are *parties* to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000).'"[15] As an initial matter, there are no utilities that are parties to the transaction;[16] neither Comcast Corporation nor Time Warner Cable (the parties to the transaction) is a *utility*.[17] Moreover, the only California-certificated utilities that are impacted by proposed transaction, TWCIS (CA) and Bright House California, as ORA and other Respondents concede,[18] are not *parties* to the transaction.[19] Therefore, no utilities are parties to the proposed transaction, and section 854(b) on its face does not apply.

TURN attempts an end-run around the statutory language by urging the Commission to "pierce the veil" and include not only the revenues of utilities that are *parties to* the transaction—

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[14] *See* section III.B, *infra*.

[15] Joint Application at 12 (emphasis added).

[16] *See* Joint Application at 12.

[17] Neither Comcast Corporation nor Time Warner Cable is a regulated utility in California. Both entities are large corporations that do not directly provide telephone service in California and do not hold CPCNs from the Commission

[18] ORA Protest at 10 acknowledges that "Section 854's language indicates that it applies to public utilities, *which in the proposed merger are TWCIS, Comcast Phone and Bright House California.*" *See also* TURN Protest at 8 citing Joint Applicants' statement that "neither of the utilities impacted by this transaction – [TWCIS] (CA) [Time Warner California] or Bright House California – has gross annual intrastate California revenues exceeding $500 million." While TURN presents arguments pertinent to the question of revenues, it does not refute the fact that only TWCIS (CA) and Bright House California are the only impacted utilities.

[19] *See* Joint Application at 10-12 (describing transaction) and Exhibit B naming Time Warner Cable, Inc., Comcast Corporation, and Tango Acquisition Sub, Inc. as parties to the transaction.

as the plain text of section 854(b) requires—but also the revenues of utilities that are merely *impacted by* the transaction.[20] Although that reading of section 854(b) conflicts with the statutory text and should be rejected on that ground alone, TURN's argument also fails on its own terms. Even if the revenues of utilities impacted by (but not parties to) the proposed transactions were considered as TURN proposes, neither of the impacted utilities, TWCIS (CA) and Bright House California, has gross annual revenues within California exceeding $500 million.[21] And that remains true even if we also consider the revenues of those entities' non-utility affiliates that provide VoIP service and the revenues of the Comcast Corporation CLEC affiliate.[22] Thus, under any reading of section 854(b), that provision simply cannot apply here.

While TURN asserts that Joint Applicants "failed to provide any documentation in the Joint Application detailing the California revenues of any of the parties to this proposed transaction,"[23] this information is readily available to the Commission via various reports that are filed by TWCIS (CA) and Bright House California.[24] This information shows that the revenue threshold necessary for section 854(b) to apply is not satisfied here under any analysis.[25]

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[20] TURN Protest at 8.

[21] For this reason, the instant cases is also clearly distinguishable from the case cited by TURN, *Joint Application of Pacific Telesis Group (Telesis) and SBC Communications, Inc. (SBC)*, D.97-03-067, 71 CPUC 2d 351 (March 31, 1997) ("SBC/Telesis Merger"). In that case, the Commission applied section 854(b) because the utility impacted by the transaction (Pacific Bell) was the largest incumbent local exchange carrier in the state with *$26.16 billion* in assets.

[22] *See* Application at 12 & n.10.

[23] TURN Protest at 8.

[24] Even though it is not a utility impacted by this transaction, Joint Applicants note that information pertaining to the California revenues of Comcast California Phone, LLC is also readily available to the Commission. In addition, pursuant to TURN's request, Joint Applicants are working to develop a Non-Disclosure Agreement under which this revenue information can be shared with the consumer groups that are parties to this proceeding.

[25] Greenlining offers an additional novel theory for the application of section 854(b), arguing that under section 854(f) the revenues of TWCIS (CA) affiliates should be considered for purposes of determining whether the section 854(b) revenue threshold is met. Greenlining's theory is unsupported and, in any event, contradicts the plain language of section 854(f)—a provision that, on its face, not only applies only

In sum, because there is no utility that either is a "party" to—or is even impacted by—the transaction that meets the specified financial threshold of $500 million in annual California revenues, section 854(b) clearly does not apply.

B. The Commission Should Not Apply Pub. Util. Code Section 854(c) to the Proposed Transfers

As explained in the Joint Application, "Section 854(c) applies only in circumstances "where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000)."[26] Although section 854(c) uses the term "entities" rather than "utilities," the legislative history confirms that section 854(c) "deals only with mergers involving the largest *utilities* (e.g. PG&E, SCE, SDG&E, SoCal Gas, Pacific Bell, GTE, and AT&T)," and the Commission otherwise retains "discretion" under section 853(b) to approve a merger that "do[es] not involve the largest utilities" without having to undertake a full-blown analysis under section 854(c).[27]

Respondents do not contest this legislative construct or intent, instead the thrust of their arguments is that a section 854(c) review must be undertaken unless exempted under section 853(b) and that the Commission must make this determination on a case-by-case basis.[28]

Even accepting these premises as true, the bottom line result is the same: In all of the cases cited by both Joint Applicants and Respondents where the impacted utilities were CLECs

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when the "acquiring" entity is a utility which as is explained above is not the case." *See* Greenlining Protest at 3-4, stating that "Greenlining concedes that under the plain language of the statute, the Commission cannot consider the gross annual revenues of Comcast's affiliates, because Comcast is an acquiring company."

[26] Application at 12.

[27] *See* Senate Committee on Energy, Utilities and Communications Analysis, AB 119 – Baca, Hearing Date: July 11, 1995B, as Amended: July 10, 1995, http://leginfo.ca.gov/pub/95-96/bill/asm/ab_0101-0150/ab_119_cfa_950710_140643_sen_comm.html (emphasis added). This legislative construct also applies to section 854(b).

[28] TURN Protest at 11; see also Greenlining Protest at 5. The remaining Respondents do not even attempt to explain why section 854(c) should apply here.

or NDIECs, the Commission determined that no section 854(c) analysis is required for a telecommunications transaction.[29] In fact, the Commission explained in the Verizon-MCI decision that it has uniformly exempted transactions involving CLECs from review under section 854(c), with limited exception.[30] In that same Decision, the Commission cited more than 40 section 854 transfer of control cases involving telecommunication companies in which the Commission determined that no section 854(c) analysis was required.[31] Notably, the Commission has decided not to require a section 854(c) analysis in several cases like the instant one where the impacted CLECs were relatively small but the parties to the transaction were sizeable.

For example, Greenlining concedes that the Commission exempted both the MCI-BT and SBC-AT&T transactions from section 854(c) review,[32] even though the parties to both of those transactions clearly were very large entities. The Commission similarly exempted the Verizon-MCI merger from section 854(c) even though that transaction also involved very large entities. In finding that an exception was appropriate in that case, the Commission relied on the fact that all of MCI's California subsidiaries were NDIECs and CLECS, and only a small percentage of

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[29] *See* Application at 13, 14, and 29; Greenlining Protest at 5-7; JMP Protest at 2, 3 and 5; TURN Protest at 8-11. TURN cites D.97-03-067. While this Decision did involve a review under section 854(c), as noted in FN 24, *supra*, this review pertained to the transfer of control of an ILEC, Pacific Bell.

[30] *See In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI,* D.05-11-029 mimeo at *30. S*ee also In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation, Opinion Approving Application to Transfer Control,* D.05-11-028 mimeo at *34.

[31] See D.05-11-029, at App. A.

[32] *See* Greenlining Protest at 5-6, citing D.05-11-028 at 20. *See also In the Matter of the Joint Application of MCI Communications Corporation (MCIC)and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, D.97-05-092.

MCI's revenues were derived from the California intrastate utilities.[33] The situation in the instant transaction is comparable. Here, Time Warner Cable's only regulated California subsidiary, TWCIS (CA), is a CLEC and only a small percentage of Time Warner Cable's overall revenues come from this entity.

The factors that the Commission has repeatedly considered in prior cases all weigh in favor of finding that section 854(c) does not apply to the Application. Or, if it does, of granting an exemption for the following reasons: (1) the fact that the transaction does not involve a combination of two traditionally regulated telephone systems;[34] (2) the company to be acquired is not a major provider of telecommunications services in California;[35] and (3) the proposed merger only involves CLECs.[36]

C. Section 706(a) of the Telecommunications Act of 1996 Does Not Grant the Commission Authority to Review the Broadband-Related Aspects of the Proposed Transfers

Alone among the Respondents, ORA suggests that section 706(a) of the Telecommunications Act of 1996 empowers the Commission to review the broadband-related aspects of the proposed transfers. That argument not only flies in the face of state and federal law, it also improperly invites this Commission to resolve issues presently pending before the FCC. Those issues are beyond the scope of this proceeding—and the Commission's jurisdiction.

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[33] *See* D.05-11-029, at * 31. *See also* Appendix A (citing to numerous decisions in which the Commission did not undertake a section 854(c) analysis).

[34] *See* D.05-11-029, at * 24, citing Decision 97-05-092, 1997 Cal. PUC LEXIS 340, * 27-31 (May 21, 1997).

[35] *See* D.05-11-029, at * 24, citing Decision 01-03-079, 2001 Cal. PUC LEXIS 219 (Mar. 27, 2001).

[36] *See* D.05-11-029, at * 24, citing Decision 98-08-068, 1998 Cal. PUC LEXIS 912 (Aug. 31, 1998). *See also* D.05-11-029, Appendix A, listing 41 Commission decisions authorizing transaction involving NDIECs and CLECs that were exempted from the detailed requirements of section 854(b), and with limited exceptions, section 854(c).

As recently codified in section 710 of the Public Utilities Code, the longstanding policy of this state has been to allow innovative IP-enabled services (including broadband) to flourish without the burden of traditional utility regulation.[37] Section 710's legislative history reflects that the "CPUC has never regulated . . . IP-enabled services like traditional telephone service," and explains that section 710 was designed to ensure that California continues to adhere to its policy of "preserv[ing] the vibrant and competitive free market" for Internet and other interactive computer services.[38] To safeguard the "current regulatory structure," section 710 broadly prohibits the Commission from exercising jurisdiction over IP-enabled and VoIP services, unless it is "expressly" authorized to do so by statute.[39] ORA concedes that section 710 generally "prohibits Commission jurisdiction or control over IP-enabled services,"[40] yet purports to locate the Commission's supposed authority to regulate the broadband-related aspects of the proposed transaction in a different statute—section 706(a) of the federal Telecommunications Act of 1996. ORA further contends that its novel jurisdictional theory is supported by the D.C. Circuit's recent opinion in *Verizon v. FCC*, which invalidated two of the FCC's "open Internet" or "net neutrality" rules.[41] Significantly, however, ORA fails to cite a single case where the Commission has even suggested (let alone found) that it has authority to review the transfer of control of an unregulated entity that provides broadband service. While it is unnecessary to

[37] *See* SB 1161 (approved by Governor, Sept. 28, 2012), Chapter 733 ("SB 1161"), amending the Public Utilities Code to add a new section 710 (effective January 1, 2013).

[38] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012, (Hearing April 17, 2012) at 6.

[39] PU Code section 710(a) ("[t]he commission *shall not* exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c)) (emphasis added).

[40] ORA Protest n.34.

[41] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

detail all of the myriad flaws in ORA's argument, it is sufficient to note that the *Verizon* decision undercuts—rather than supports—ORA's claim. As the court acknowledged in *Verizon,* the FCC has classified broadband Internet access service as an interstate "information service" under the Communications Act of 1934,[42] a classification that limits the FCC's ability to impose traditional common carrier regulation on providers of that service.[43] The *Verizon* decision precludes both state and federal regulators from imposing common carrier regulation on broadband information services[44] consistent with longstanding precedent preempting state regulation of broadband information services.[45]

As the court in *Verizon* recognized, section 706(a) "must be read in conjunction with other provisions of the Communications Act."[46] Moreover, section 706(a) cannot overcome the limits on a state's jurisdiction imposed by the state's own law. Section 706 only directs state commissioners to use "regulatory methods" available to them—it does not suggest only intent to supplant the state legislature's view of what regulatory methods are available to the Commission. Here there are two important limitations under state law. First, the California Legislature has directed the Commission to review of transfers of control of *utilities* under PU Code section 854. There is no provision in the Public Utilities Code for reviewing transactions involving non-utility entities. Second, this State's longstanding policy—recently reaffirmed and codified in

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[42] *Id.* at 650 (citations omitted).

[43] *See id., citing the Wireless Broadband Order*, 22 F.C.C.R. at 5919 ¶ 50 (noting that "'a service provider is to be treated as a common carrier for the telecommunications services it provides, but it *cannot be* treated as a common carrier with respect to other, non-telecommunications services it may offer,'" and describing it as "obvious" that the FCC "would violate the Communications Act" if it imposed common carriage regulation on broadband providers) (citations omitted).

[44] *Id.*

[45] *See National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967, 975-76 (2005).

[46] *Verizon* at 640 (quoting 47 U.S.C. § 152(a)).

PU Code section 710—limits the Commission from exercising jurisdiction over broadband and other IP-enabled services to narrowly prescribed areas—and reviewing a transfer of control of a provider of IP-enabled services is not among those limited areas.[47]

Nor does ORA's specious argument that the proposed transfer of control will threaten "open Internet" or "net neutrality" rules change this analysis.[48] As ORA acknowledges,[49] the FCC has open proceedings concerning those very rules,[50] and will take into account as part of its own analysis of the larger merger between Comcast Corporation and Time Warner Cable the undertaking by Comcast Corporation to extend to Time Warner Cable the company's existing commitment to abide by the FCC's 2010 Open Internet rules. And, to the extent that ORA questions the wisdom of the FCC's classification of broadband Internet access service as an unregulated "information service" rather than a "telecommunications service" subject to common carrier regulation,[51] that specific issue is also before the FCC. And under well-established principles of federal law, the FCC—not the Commission—is the proper forum for resolution of these issues.

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[47] ORA attempts to sidestep section 710 by noting that its prohibition on the exercise of jurisdiction over IP-enabled services is subject to an exception: "except as required or *expressly* delegated by federal law or *expressly* directed to do so by statute or as set forth in subdivision (c)." Pub. Util. Code § 710(a). That exception does not assist ORA, however, because it requires a clear and unmistakable statement granting the Commission regulatory authority over IP-enabled/VoIP services. *Id.*; *In re Benson*, 36 Cal. 4th 1096, 1106 (2005) (law requiring "express" declaration and written statement requires "express written language" and "clear understanding" of intention); *see also Merriam-Webster Online Dictionary* (defining "express" as "said or given in a clear way," including "explicitly stated"). And here, again, the *Verizon* case undermines (rather than supports) ORA's argument: Far from describing section 706(a) as a clear or express grant of regulatory authority, the *Verizon* Court viewed the provision as "ambiguous." *See* 740 F.3d at 637-638.

[48] ORA Protest at 23-24.

[49] *Id.* at 27 & n.108.

[50] *See Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Dkt. No. 14-28 (rel. May 16, 2014).

[51] *See* ORA Protest at n.108.

IV. THE PROPOSED TRANSFERS OF CONTROL ARE IN THE PUBLIC INTEREST AND SHOULD BE APPROVED

As explained in the Application, the applicable standard for reviewing the proposed transfers is whether the transaction would be "adverse to the public interest."[52] Far from being adverse to the public interest, the transfers proposed are decisively in the public interest. Notably, no Respondent contests (or even addresses) Joint Applicants' showing that this proposed transaction will enhance competition in the provision of business-class voice services. And, as the Application demonstrates (and as Respondents have failed to refute), the transaction will produce many public interest benefits in the retail voice market.[53]

A. The Transaction Will Enhance Competition in the Voice Market

In reviewing applications seeking authority to transfer control under section 854, the Commission looks at the impact on competition in the relevant market.[54] The relevant services here are the voice services provided in *California voice market*. Joint Applicants explain in the Application (i) that the proposed transaction will promote the deployment of advanced voice services and enhance competition in the voice marketplace,[55] and (ii) that Time Warner Cable and Comcast Corporation do not compete directly with each another in any part of California.[56]

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[52] Application at 14 (citing D.00-06-079).

[53] While as explained above, Joint Applications admit that section 854(c) does not apply to the proposed transfers, Joint Applicants nevertheless submitted a brief analysis in the Application demonstrating that the transaction meets the section 854(c) factors in any event.[53] Other than their unfounded attacks on Comcast Corporation's and Time Warner Cable's character and management quality, which are refuted below, Respondents offer little more than conclusory statements to challenge any other aspect of Applicants' showing that the transaction is in the public interest under section 854(c). *See, e.g.*, TURN Protest at 14; Greenlining Protest at 21; ORA Protest at 30.

[54] ORA Protest at 25.

[55] Application at 14.

[56] Application at 21. The Application notes that Comcast Corporation has identified a limited number of ZIP codes in California in which Comcast Corporation and Time Warner Cable both serve customers. However, the total number of customers served by both companies in these areas is *de minimis*.

Several of the Respondents take issue with these facts. Although much of ORA's Protest pertains to impacts on competition in the broadband marketplace (and therefore should be disregarded as outside the scope of this proceeding), ORA also claims that Joint Applicants fail to explain how the proposed transaction will enhance competition in the voice marketplace. ORA[57] and TURN[58] also suggest that the resulting combined company will be the dominant provider of voice services. In support of its position, ORA claims that Comcast Corporation will have a post-merger 50% share of the VoIP market.[59] Respondents are wrong on both counts.

As an initial matter, Joint Applicants already explained how their combination would enhance the deployment of voice services and voice competition.[60] Specifically, the Application details and offers several examples of how the transaction will allow Comcast Corporation to integrate the best features of its voice offerings with the best features of Time Warner Cable's offerings, creating best-in-class voice service offerings.[61] One example, as discussed in the Application, is Comcast Corporation's new advanced and flexible IP Multimedia Subsystem ("IMS") network architecture. This recent network investment will expand the ways in which customers can access and use voice services. IMS enables customers to access voice service from different locations using a variety of methods and networks. Combining this network

[57] ORA Protest at 29 (citing to Comcast Corporation's purported post-merger 50% share of the VoIP market).

[58] *See* TURN Protest at 13 asserting that the Commission must determine the exact market share that the entities have today.

[59] ORA Protest at 29 citing the CPUC's 2011 Market Share Analysis. Note this 2011 report uses data from Dec 2009 so at a minimum it is clearly out of date. See also TURN Protest at 13 asserting that Joint Applicants offer "no verifiable support for the assertion" that "the transaction will not result in the combined company holding a dominant share of the market in California.", citing Application at 21.

[60] *See* Application at 15-16.

[61] *Id.* at 15.

architecture with Time Warner Cable's already strong VoIP product will produce an advanced, state-of-the art offering.[62]

ORA's claims regarding the post-merger company's share of the "VoIP" market rests on the fallacy that the VoIP services constitute a distinct market. Economists and regulators agree that the market at issue is the broader voice market, which, at a minimum, includes both circuit switched *and* VoIP landline service. For example, the FCC has explained that "facilities-based VoIP services clearly fall within the relevant service market for local services."[63] Moreover, the Commission has held that "the voice market today consists of a rich mix of wireline telephony, wireless telephony, voice over Internet protocol (VoIP), and satellite voice offerings."[64] For the purposes of evaluating competition, clearly the Commission considers VoIP to be part of a broader spectrum of services that make up the California voice market.

Taking into account the voice market as a whole, it is clear that Comcast Corporation's share of that market, even after combining with Time Warner Cable, will not rise to the level of

[62] *See* Application at 15-16.

[63] *SBC Commc'ns Inc. & AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290 ¶ 87 (2005). *See also In re Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd 8622, 8650 n.54 (2010) ("As in the past, we find that mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market."); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662 ¶ 90 (2007) ("In addition, the record evidence suggests that, for certain categories of customers, mobile wireless service is viewed as a close substitute to wireline local service").

[64] *See* D.07-12-054 mimeo at 8, explaining that the Commission's Uniform Regulatory Frameworks proceeding (D.06-08-030) noted that finding each telecommunications service constitutes a separate "market" is no longer a relevant factor for analyzing or explaining the dynamics of today's technologically diverse voice communications environment. *See also* D.10.12-045 mimeo at 17 and D.07-09-020 mimeo at 95.

concern. In fact, given the prevalence of other providers in the market, it is far more likely that Comcast Corporation's market share will be relatively small.[65]

B. Respondents' Concerns About Reduced Competition Are Unfounded

As Joint Applicants explain in the Application, Time Warner Cable and Comcast Corporation do not compete directly with each other in California.[66] Indeed, JMPs concede "it is true that Time Warner and Comcast rarely compete directly."[67] Although ORA and Greenlining baldly assert that the proposed transfers will reduce competition, they do not allege that there is direct competition between Time Warner Cable and Comcast Corporation.[68] Lacking any evidence of actual competition that could be reduced by the transaction, Respondents try to support their claim by relying on meager speculation that the transfers may adversely affect *potential competition* in the voice market. However, under the test established by the Commission, the transaction will not result in the loss of potential competition.

C. There Will Be No Loss of Potential Competition

The Commission has held that in order to prove a loss of potential competition, one must establish all of the following factors:

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[65] *See* the FCC's Wireline Competition Bureau, Industry Analysis and Technology Division report on Local Telephone Competition: Status as of December 31, 2012 ("FCC Competition Report"), at 23 showing that the non-ILEC share of the total end user switched access lines and VoIP subscriptions (not including wireless) for CA is only 36% (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf) Moreover as of December 2012, there were there were 196 reporting ILEC and non-ILEC entities and 14 mobile telephone facilities-based carriers in California. *See* FCC Competition Report at page 28-29.

[66] Application at 2. Comcast Corporation has identified a limited number of ZIP codes in California in which Comcast Corporation and Time Warner Cable both serve customers, but the total number of customers served by both companies in these areas is *de minimis*.

[67] JMP Protest at 3. As noted above, JMPs contend that a source of competition will be lost in the broadband market. But, as shown above, that is not the relevant market.

[68] *See* ORA Protest at 26 and Greenlining Protest at 18. Greenlining, however, claims that Time Warner Cable and Charter do compete directly in the LA market. The issue of whether and to what extent Charter competes with Time Warner Cable is not properly before this Commission and should be addressed – if at all – in any transaction that might be filed relating to Charter. See Greenlining Protest at 13.

> (1) the *relevant market* is concentrated; (2) but for the merger, the acquiring firm would likely have entered the market in the near future either on its own or by toehold acquisition; (3) there must be few other potential entrants with comparable advantages; and (4) such market entry would carry substantial likelihood of ultimately producing deconcentration of the market or other significant pro-competitive effects."[69]

At the outset, the *first* factor clearly does not apply. As explained above, the relevant market at issue is the California voice market, and that market "consists of wireline telephony, wireless telephony, voice over Internet protocol (VoIP), and satellite voice offerings."[70] Given the broad array of options available to California customers and the number of providers, the relevant market plainly is not concentrated.[71]

Nor does the *second* factor apply; as shown above, Comcast Corporation and Time Warner Cable do not compete directly with one another in California.[72] Further, neither company has ever so much as suggested any plans to enter the other's market, so the standard of "likely" entrance into the market "in the near future" clearly is not met. In suggesting the contrary, ORA states that it "is not aware of any reason why" the two companies "could not build out their networks in each other's territory …"[73] This speculation misses the mark. Given the massive financial investment required of either company to build out the infrastructure necessary to compete on a facilities-based basis with the other providers in the voice market, the already competitive state of the relevant market here, and the companies' longstanding failure to

[69] D.00-03-021, citing D.97-03-067 (71 CPUC2d 351, 383) (emphasis added).

[70] *See* D.07-12-054 mimeo at 8.

[71] *See* FN 72, supra, as the FCC Competition Report shows, as of December 2012, there were there were 196 reporting ILEC and non-ILEC entities and 14 mobile telephone facilities-based carriers in California (at page 28-29).

[72] Comcast Corporation has identified a limited number of ZIP codes in California in which Comcast Corporation and Time Warner Cable both serve customers, but the total number of customers served by both companies in these areas is *de minimis*.

[73] ORA Protest at 28.

enter one another's markets as a result of those factors, doing so would make little sense. Before filing the instant Application, Comcast Corporation and Time Warner Cable had already decided that their best value is offered by enhancing the service to the customers within their own footprints.

The *third* factor, too, is absent here. Because of the number of non-ILEC providers in California, the "rich mix" of voice services available[74] and the relative ease of entry into the VoIP market, there are far more than a "few other potential entrants" in this robust marketplace.[75]

Lastly, for the *fourth* factor, as Joint Applicants explained, "the proposed transaction will generate multiple pro-consumer and pro-competitive benefits including accelerated deployment of existing and new innovative products and services for millions of customers and will be beneficial on an overall basis for both Comcast Corporation and Time Warner Cable and TWCIS (CA)."[76] In light of this, because the relevant market is not concentrated, and because there is no competition between Comcast Corporation and Time Warner Cable, it is clear that allowing the merged company to compete could not produce "deconcentration" in the market.

Based on these factors, no loss of potential competition will result from the proposed transfers, and the proposed transaction is not "adverse to the public interest."[77]

D. Time Warner Cable is Not a "Maverick" Provider

Greenlining asserts that the proposed transaction would result in the loss of Time Warner Cable as a "maverick" provider.[78] Although unclear, the basis for Greenlining's theory appears

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[74] *See* p.16, *supra*.

[75] *See* FN 72, supra and FCC Competition Report at page 28-29,.

[76] Application at 24.

[77] D.00-06-079.

to be that Time Warner Cable has indicated that it intends to provide its VoIP telephone services as a common carrier subject to Commission regulation, and therefore is a "maverick" that warrants protecting. Greenlining's understanding of the "maverick" provider concept is mistaken.

The Department of Justice's Horizontal Merger Guidelines ("Guidelines") describe a "maverick" firm as one that "plays a disruptive role in the market to the benefit of customers."[79] The Guidelines explain that a "maverick" firm may be one that threatens to disrupt market conditions or take the lead in price cutting.[80] Greenlining fails to explain how Time Warner Cable's acceptance of common carrier regulation for its retail voice services will lead to different service options or pricing for consumers. Moreover, the Guidelines make clear that market definition turns on "customers' ability and willingness to substitute away from one product to another…"[81] As explained above and in the Application, Comcast Corporation and Time Warner Cable do not compete in California. As a result, there is no reasonable potential that customers would be able and willing to substitute from one provider to the other and therefore no foreseeable way that Time Warner Cable could threaten to disrupt market conditions that affect Comcast Corporation. Greenlining attempts to bolster its maverick argument by theorizing that the transaction could "reduce service options" for customers.[82] However, this is mere speculation for which Greenlining offers no support.

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[78] Greenlining Protest at 18. On this issue, the Protests are at odds with one another. ORA, for example, complains about Time Warner Cable's supposed "monopoly power in California." ORA Protest at 17.

[79] U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 2.1.5 (rev. ed. 2010) , *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf

[80] Guidelines at 2.1.5.

[81] Guidelines at section 5.3.

[82] Greenlining Protest at 20.

E. Comcast Corporation is Clearly Qualified to Manage TWCIS (CA)

The Application states that "Comcast Corporation has superior management capabilities gleaned through its experience providing high-quality service throughout California and other states. Time Warner Cable's subsidiary companies—including TWCIS (CA)—will benefit from this management expertise as a result of the transaction."[83] Nonetheless, certain Respondents have attempted to impugn Comcast Corporation's managerial abilities in a misguided effort to portray the proposed transaction as contrary to the public interest. These baseless and misdirected claims should be rejected.

1. An Unrelated Pending OII Involving Comcast Corporation is Irrelevant

Greenlining and ORA suggest that the Commission should block or at least have reservations about approving this transaction because of a pending Order Initiating Investigation ("OII") against Comcast Corporation in an unrelated matter arising out of the inadvertent release of certain unlisted telephone numbers assigned to subscribers to Comcast IP's XFINITY VoIP service.[84]

As an initial matter, the instant Application is not the appropriate proceeding to discuss or make determinations on the issues before the Commission in the separate OII. Should the Commission ultimately determine that remedial action is appropriate with respect to the OII, any such action should be addressed in that docket. The Commission must reject any assertion that the mere existence of the OII or the fact that a company has made a mistake is grounds to find that the Application is not in the public interest.[85]

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[83] Application at 23.

[84] I.13-10-003 ("Non-Pub OII").

[85] *See* D.12-05-009, in which the Commission explained that it would not deny an Application of Ponderosa Cablevision on the basis of previous penalties and potential violations because the Applicant

In all events, the OII concerns a fully acknowledged mistake of Comcast Corporation's VoIP affiliate that resulted in the inadvertent release of non-published listings; there is no support for any suggestion that the release was intentional or deliberately calculated to benefit Comcast Corporation.

Nor is there merit to Greenlining's contentions that Comcast Corporation's behavior raises "serious questions about how Comcast Corporation treats its current customers, and how it will treat Time Warner's customers should the merger be approved."[86] These contentions are demonstrably untrue, and show a fundamental misunderstanding of the OII. The record shows that Comcast Corporation has taken extensive measures to provide relief to the affected customers and to prevent similar incidents from occurring. It has also worked with the Commission staff to provide answers to multiple data requests and provide records and documents pertaining to the inadvertent release. As a party (intervenor) in the OII proceeding, Greenlining should be well aware of these facts—yet inexplicably ignores them in the context of its challenge to the present transaction.

Finally, the Commission should firmly reject the unsubstantiated speculation that Comcast Corporation purposefully withheld information regarding the inadvertent release from the Commission and the Legislature during the pendency of SB 1161.[87] The notion that Comcast Corporation deliberately "*waited* to inform the Commission" until after the effective date of SB 1161[88] is wholly unfounded and has no place in this docket. Comcast Corporation is fully

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had already resolved the issues identified or was in the process of taking affirmative action to ensure that it met its regulatory obligations and its responsibilities to its customers.

[86] Greenlining Protest at 10.

[87] *See* Greenlining Protest at 11; ORA Protest at 13.

[88] ORA Protest at 13 (emphasis added).

prepared to demonstrate the falsity of this allegation in its proper procedural context—the OII docket.

2. An Unrelated Lawsuit Involving Time Warner Cable is Irrelevant

ORA next attacks Time Warner Cable for its role in an ongoing lawsuit with the City of Los Angeles. This argument fares no better than ORA's misplaced reliance on the unrelated OII. The municipal litigation has no relevance to the present Application because (i) it relates to the limitation of the amount of fees that are required to be paid to the municipality under Time Warner Cable's state-issued franchise and under federal law —an issue involving only cable services;[89] (ii) the Time Warner Cable affiliate is not an entity subject to the Application; (iii) a dispute about fees does not present a character issue; and (iv) the allegations quoted from the complaint (about a "virtual monopoly for the provision of cable service") are unsupported and outside the scope of the instant Application.[90]

3. Comcast Corporation's Certification is Sufficient

Greenlining asserts that Comcast Corporation's certification is insufficient, claiming that Comcast Corporation is not exempt from the certification requirement and that Comcast Corporation did not provide sufficient information to meet the requirements of D.13-05-035.[91] Greenlining's claims have no merit and should be rejected.

As an initial matter, contrary to Greenlining's assertions,[92] Comcast Corporation did not claim to be exempt from the Commission's certification requirements;[93] the company did in fact

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[89] *See* p. 3, *supra* (explaining that cable service is outside the scope of the present transaction).

[90] ORA Protest at 16.

[91] Greenlining Protest at 10.

[92] Greenlining Protest at 9. ("Applicants argue that they do not have to meet those requirements because it is unreasonably burdensome for the Applicants to make that broad certification.")

[93] Greenlining asserts that Comcast Corporation's "affidavit makes claims about Comcast Corporation, but are silent as to Comcast California Phone."[93] This too is incorrect. The certification does include

provide a certification. Comcast Corporation simply provided a more narrowly tailored version of the certification focused on the entity acquiring control, Comcast Corporation. This version is appropriate since, as Comcast Corporation explained, a company of Comcast Corporation's size is unable to make the broad certification provided in D.13-05-035 for all of its affiliates and "management capacity" employees.[94]

Moreover contrary to Greenlining's allegations Comcast Corporation's certification does provide sufficient information to meet the requirements of D.13-05-035. Greenlining conveniently ignores the fact that Decision 13-05-035 does not require a party to certify that it meets each of the stated factors. Instead, OP 14 expressly provides that "if the applicant is unable to make the required verification, the applicant must attach relevant documentation." Towards this end, Comcast Corporation provided a list of significant FCC and state Commission complaints/investigations and their outcomes (settlements or decisions) for the last 5 years.[95] In addition, Comcast Corporation provided a link to its annual and quarterly reports with the Securities and Exchange Commission ("SEC") for the last ten years.[96] Thus Comcast Corporation's certification clearly meets the requirements of Decision 13-05-035.

F. The Transaction Will Be Seamless to Customers, Including LifeLine Customers

Greenlining and TURN both speculate that the transaction may result in a decision by Comcast Corporation to relinquish TWCIS (CA)'s designation as an Eligible

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some information with respect to Comcast California Phone, LLC. However, since Phone is not the entity acquiring control, the focus of the certification was correctly on Comcast Corporation.

[94] Application at 26.

[95] *See* Attachment G to the Application.

[96] Available at: http://www.cmcsa.com/sec.cfm?DocType=&DocTypeExclude=&SortOrder=FilingDate%20Descending&Year=&Pagenum=1

Telecommunications Carrier ("ETC") and eliminate it as a potential or existing LifeLine provider (assuming TWCIS (CA) has commenced providing LifeLine service when the merger is consummated).[97] Comcast Corporation has made no decision to relinquish TWCIS (CA)'s ETC designation post-merger. In all events, however, Comcast Corporation has committed to follow the established Commission processes if at any time it decides to relinquish the ETC designation.[98] If that eventuality were to occur, the Commission could of course—as part of the relinquishment process—take steps at that time to ensure that any current LifeLine customers are transferred to other LifeLine providers in a seamless and appropriate manner.[99]

Greenlining further posits that "there is a significant risk that Applicants will engage in illegal coordinated conduct" and that such relinquishment of LifeLine "would be strong evidence of coordinated anticompetitive behavior between Comcast and Time Warner." That is irresponsible speculation. Joint Applicants strenuously deny this unfounded allegation, and request that the Commission strike it from the record or, at a minimum, disregard it.

G. Comcast Corporation's Commitment to Supplier Diversity is in the Public Interest

Bootstrapping its own decision to award Comcast Corporation an "F" grade in supplier diversity, Greenlining suggests that this evidences that the proposed transfers are not in the public interest.[100] This claim is unfair, and presents a highly distorted picture of Comcast Corporation's exceptionally strong commitment to diversity.

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[97] *See* Greenlining Protest at 15; see also TURN Protest at 14.

[98] Application at 22.

[99] *See* D.08-04-042 and D.08-02-006, which address how at the time of service relinquishment LifeLine customers are transferred to a default carrier if they do not select an alternate provider.

[100] Greenlining Protest at 21 (citing its own 2013 Supplier Diversity Report Card).

As an initial matter, the Commission's Supplier Diversity program does not apply to cable providers.[101] Nor does Comcast Corporation's regulated CLEC (Comcast California Phone, LLC) even meet the revenue threshold that triggers required participation in the program.[102] Nevertheless, Comcast Corporation has chosen to participate in this program and to do so not only for its regulated CLEC /CPCN holder entity but for its cable, voice and broadband offerings in California. In addition, Comcast Corporation is the first California cable company to file the first, fully compliant GO 156 supplier diversity report. Comcast Corporation's purely **voluntary** participation in the Supplier Diversity program demonstrates the level of the company's commitment to diversity, and Comcast Corporation should be praised—not pilloried—for its efforts in this regard. Even Greenlining itself has acknowledged that "Comcast has made steady progress towards more transparency and better results, for which they should be lauded."[103]

Greenlining also asserts that "Applicants have made no greater commitment to substantially improve the new company's efforts to diversify its suppliers or workforce, and overall economic development of our communities" in the Application.[104] That is demonstrably false. As set forth in the Application, Comcast Corporation has committed to extend

[101] *See* PU Code section 8283(a) requiring participation in the Supplier Diversity Program from "each electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates."

[102] *Id*.

[103] Report Card at 31. Available at: http://greenlining.org/wp-content/uploads/2013/06/2013-SD-Report-Card-to-post.pdf. Highlighting the *Alice in Wonderland* logic of its complaint, Greenlining neglects to note that Time Warner Cable does not participate at all in the Supplier Diversity program—a fact that Greenlining emphasizes in its Report Card. Report Card at 9 ("Time Warner Cable failed to report under GO 156").

[104] Greenlining Protest at 21.

participation in the program to Time Warner Cable as part of the proposed transfer of control.[105] This is critical because, as Greenlining itself acknowledges, Time Warner Cable does not participate in the Supplier Diversity program today.[106] While Greenlining does not view Comcast Corporation as "well-performing" under the Supplier Diversity Program,[107] the fact remains that Comcast Corporation's participation surpasses that of Time Warner Cable, and the extension of Comcast Corporation's existing participation to Time Warner Cable will expand the participation in the Supplier Diversity program and open new opportunities for California diverse businesses.

V. THE COMMISSION SHOULD REJECT RESPONDENTS' EFFORTS TO CAUSE DELAY BY ADVANCING MERITLESS PROCEDURAL ROADBLOCKS

Respondents propose various procedural roadblocks in an apparent attempt to slow down this Application and make it more procedurally cumbersome. Specifically, the protesting parties assert that the Commission should: (i) open an OII on the transaction; (ii) re-categorize it as adjudicatory; (iii) hold hearings; and (iv) stay the proceeding. The Commission should reject all of these delay tactics out of hand. As explained above, this is a narrowly tailored transaction relating to the transfer of control of one small CLEC (and the pro forma transfer of control of a second small CLEC) in a highly competitive market in which the two entities do not compete directly against one another.

[105] Application at 15.

[106] Although Greenlining does not acknowledge this fact in its protest it is clearly reflected in its Report Card.

[107] Greenlining Protest at 21.

A. The Commission Should Not Open an OII on the Application

ORA and TURN urge the Commission to open an investigation to probe certain facts relevant to the proposed transaction.[108] These requests are unwarranted and unnecessary given the currently pending Application.

Neither TURN nor ORA provides any explanation why adequate fact-finding cannot be conducted as part of the existing proceeding. Although Joint Applicants respectfully assert that there is substantial information in the Application that would enable the Commission to make the requisite determination that each transfer of control is in the public interest, there are ample existing mechanisms to gather additional facts, as needed, short of opening a full-blown investigation.[109] Moreover, it is established Commission practice that the manner in which section 854 authorization is sought is via Commission application.[110] As such, an application is the appropriate procedural vehicle for a section 854 transfer of control case.

ORA asserts that the Commission should investigate the proposed merger "as it did in the AT&T-T-Mobile merger."[111] However, ORA fails to address the fundamental differences inherent in the procedural processes for wireless merger review versus CLEC transfer of control review as in the proposed transfers of control. In the AT&T/T-Mobile merger there was no formal proceeding pending in which the Commission could assess the transaction; for their proposed merger, AT&T and T-Mobile filed a brief pro forma notice letter in accordance with the D.95-10-032 procedures for CMRS providers, not an application. Moreover, unlike the instant case, AT&T and T-Mobile directly competed in many parts of the state and the merger

[108] *See* ORA Protest at 4; TURN Protest at 12.

[109] *E.g.* the Commission could issue a Data Request.

[110] *See e.g.*, Rule 3.6 of the Rules of Practice and Procedure.

[111] ORA Protest at 4.

would have resulted in the loss of a direct competitor—a result that, as explained above, will not occur here.

Moreover, it appears that a principal motivation for ORA's request that the Commission open an investigation is so that it can obtain information—specifically including information about broadband services—that is far beyond the scope of the narrow transfers of control proposed here. Again, ORA loses sight of the fact that this Application is limited to the indirect transfer of control of one CLEC and the pro forma transfer of control of another CLEC, neither of which provides broadband services. No investigation is necessary, and ORA's request should be denied.

B. The Commission Should Adhere to its Existing Categorization of This Proceeding

The Commission has determined that the Application should be categorized as a Ratesetting proceeding.[112] ORA now asks the Commission to re-categorize the proceeding as adjudicatory,[113] while TURN asserts that it should be categorized as investigatory.[114] Both requests are unsupported, as neither ORA nor TURN offers any rationale as to why the preliminary categorization is improper or why re-categorization is necessary. Moreover, the requests are at odds with the Commission's well-established procedures.

Under the Commission's Rules of Practice and Procedure, adjudicatory proceedings are classified as "(1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities."[115]

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[112] Resolution ALJ 176-3335.

[113] ORA Protest at 4.

[114] TURN Protest at 15. Joint Applicants infer this to mean that TURN is requesting adjudicatory categorization as "investigatory" is not a recognized proceeding-type before the Commission.

[115] Commission Rule 1.3(a).

Neither of these categories applies here. Therefore, based on the plain language of Rule 1.3(a), an adjudicatory categorization is inappropriate, and the Commission should adhere to its existing categorization of this proceeding as Ratesetting.

C. Hearings are Unnecessary

Contrary to the requests by Greenlining, the JMPs, and TURN, no evidentiary hearings should be held on the Application.[116] As an initial matter, hearings are not generally held for CLEC transfers of control—especially not for indirect transfers of control like the instant one.[117]

Moreover, from a procedural standpoint, Respondents fail to state any facts that they would present at any hearings, in violation of the Commission's Rules. Rules 2.6(b) states that "If the protest requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application." Greenlining, JMPs, and TURN all contend that the Application should be denied.[118] But they fail to state any facts that they would present to support this contention. JMPs, for example, baldly assert that they will "prove" that the proposed merger will not meet the elements of PU Code section 854(c).[119] They also vaguely intimate that certain (otherwise unidentified) issues "should be explored" in evidentiary hearings.[120] For its part, Greenlining only asserts that the Commission "should investigate and make factual findings regarding the

[116] Greenlining Protest at 25, JMPs at 7, and TURN in schedule,

[117] *See e.g.*, D.13-05-018 (approving the indirect transfer of control of Sprint Communications Company, LP without hearing), D.12-06-007 (approving the transfer of control of TQAvenger Telecom, LLC without hearing), D.12-03-040 (approving the indirect transfer of control of Hypercube Telecom, LLC without hearing).

[118] *See* Greenlining at 28, JMPs at 7, and TURN at 12.

[119] JMPs at 4.

[120] *Id.* at 7.

impacts of the proposed transaction."[121] Because Respondents fail to provide specific facts that they would provide at hearings, their requests for hearings should be denied.

Moreover, a hearing is particularly inappropriate here to the extent that any factual issues raised by the Respondents overwhelmingly focus on issues plainly outside the scope of the approval sought in the instant Application—for example, JMPs' Protest, which outlines concerns with the instant proceeding pertaining to content and broadband.[122] As such, Joint Applicants respectfully request that the Scoping Ruling for this proceeding exclude evidentiary hearings from the procedural schedule.[123]

D. Requests to Hold the Proceeding in Abeyance or Consolidate It Pending any Charter Filing are Improper and, at Best, Premature

ORA contends that the Commission should hold its review of the Application until the Non-Pub OII and Time Warner Cable litigation end.[124] But there is no reason to countenance delay while two wholly unrelated matters run their course. Companies may be involved in multiple litigations at any given time; the notion that the transfer of control procedures should grind to a halt until such litigation is all resolved (presumably including exhaustion of appellate processes) is not only unsupported by the law but also fundamentally contrary to common sense.

Similarly, DISH contends that the Commission should hold the Application in abeyance until an application for a related transaction involving Charter Communications ("Charter") is filed, and then consolidate the two Applications.[125] DISH's request should also be denied. First

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[121] Greenlining Protest at 25.

[122] JMPs at 2. *See also* ORA Protest at 17 and DISH Protest at 1-2.

[123] *See* Resolution ALJ 176-3335 making a preliminary determination that hearings are needed on the instant Application. *See also* Rule 7.5 pertaining to changes to the preliminary determination of the need for hearing.

[124] ORA Protest at 17.

[125] DISH Protest at 3.

and foremost, the California portion of the Charter deal is contingent on the Time Warner Cable deal being approved and consummated, and thus the Commission should proceed with its review of this transaction first. Second, in contrast to the federal level, the aspects of the Charter deal in California that require Commission approval are very discrete and subject to a different PU Code section and different procedural mechanism[126] that does not lend itself to consolidation with the instant application. Given these clear differences, Joint Applicants respectfully submit that when the Charter a filing is made, it should be evaluated on its own merits and in under its own process and that the Commission should NOT hold this docket in abeyance for future consideration with the Charter filing.

Finally, DISH's concerns appear to be solely based on matters outside the scope of the instant proceeding. While DISH does not hold a CPCN in the state, its wireline affiliate, dishNET, LLC, does (U-7223-C).[127] Joint Applicants note that the Protest filed by DISH was not filed by its certificated entity. Therefore, it appears that DISH's concerns are based solely on the video marketplace and not the voice marketplace. Accordingly, DISH's Protest should be given no weight, as it solely focuses on matters outside the scope of this proceeding. To allow parties to challenge an Application based on unrelated facts would violate Commission process and procedures.

VI. CONCLUSION

Based on the forgoing, Joint Applicants respectfully request that the Commission reject the Protests filed on the instant Application to the extent that they do not apply to the issue before the Commission—the transfer of control of the Time Warner Cable CLEC (TWCIS (CA))

[126] The Charter CLEC will continue to hold its CPCN and to operate in California.

[127] See D.12-02-033. dishNET, LLC is an affiliate of DISH. See DISH's Regulatory Documentation webpage. Available at http://www.dishnetwireline.com/regulatory/#.

and the pro forma transfer of control of the Bright House CLEC (Bright House California) or the only service at issue, which is voice service. Further, Joint Applications urge the Commission to review and approve the transfers under PU Code section 854(a).

Joint Applicants respectfully request that the Commission find that the proposed transfers are not subject to the provisions of PU Code section 854(b) and to find that no review under PU Code section 854(c) is necessary or appropriate here (either because that provision on its face does not apply or because the Commission exempts the Application from review under section 853(b)). From a procedural standpoint, the Commission should not open an OII in this proceeding, re-categorize it as adjudicatory, hold it in abeyance, or grant evidentiary hearings.

Respectfully submitted this 9th day of June, 2014.

_____/s/_____

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